|N.D. Supreme Court|

State v. Wilt, 371 N.W.2d 159 (N.D. 1985)

Filed July 11, 1985

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff and Appellee
v.
Theodore Wilt, Defendant and Appellant

Criminal No. 1,080

State of North Dakota, Plaintiff and Appellee
v.
Duaine Altman, Defendant and Appellant

Criminal No. 1,091

Appeal from the Cass County Court, the Honorable Donald J. Cooke, Judge.
AFFIRMED.
Opinion of the Court by Levine, J.
Melody R. J. Jensen, Assistant State's Attorney, Fargo, for plaintiffs and appellees.
Kirschner and Baker, Fargo, for defendants and appellants, argued by William Kirschner.

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State v. Wilt

Criminal No. 1080

State v. Altman

Criminal No. 1091

Levine, Justice.

Theodore Wilt and Duaine C. Altman were convicted of issuing checks without sufficient funds in violation of North Dakota Century Code § 6-08-16.

Both Wilt and Altman challenge the validity of their convictions on the very grounds recently rejected by this Court in State v. Clark, 367 N.W.2d 168 (N.D. 1985). These challenges therefore are without merit and warrant no further discussion.

Altman further contends that N.D.C.C. § 6-08-16 is being unconstitutionally enforced.

In State v. Carpenter, 301 N.W.2d 106 (N.D. 1980), and State v. Fischer, 349 N.W.2d 16 (N.D. 1984), N.D.C.C. § 6-08-16.2 and 6-08-16, respectively, were declared unconstitutional as violating equal protection by creating impermissible wealth-based classifications. Because those statutes provided that payment was an affirmative defense, we held them violative of equal protection on the basis that they impermissibly burdened some individuals, i.e., indigents, while not burdening others similarly situated, i.e., holders of NSF checks who paid the holder after notice of dishonor.[1]

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Although § 6-08-16 does not violate equal protection on its face, State v. Mathisen, 356 N.W.2d 129 (N.D. 1984), Altman contends that this statute is being discriminatorily enforced by Cass County to produce the identical result that was declared unconstitutional in Carpenter and Fischer. It is clear that a facially neutral statute may violate equal protection in its application or effect. Crawford v. Los Angeles Bd. of Education, 458 U.S. 527, 102 S.Ct. 3211, 73 L.Ed.2d 948 (1982); Mathisen, supra. The Constitution forbids not only discriminatory laws but also discriminatory enforcement of nondiscriminatory laws. Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886).

In Mathisen, we set out the proof necessary to establish discriminatory enforcement.

> "To support a defense of selective prosecution a defendant must establish that other individuals similarly situated have not generally been prosecuted and that the State's selection of him for prosecution is invidious or in bad faith; that is, based upon constitutionally impermissible considerations such as wealth." Mathisen, supra, at 133.

The record indicates that in Cass County, in the vast majority of cases, the writer of an NSF check is not prosecuted if the check is paid following notice of dishonor. From this evidence Altman argues that § 6-08-16 is being selectively enforced against only those individuals financially unable to satisfy the NSF checks they have issued, i.e., indigents. This, Altman contends, sufficiently demonstrates that a facially neutral statute is being discriminatorily enforced on the basis of wealth.

However, Altman concedes there is no proof that he, or other issuers of NSF checks similarly situated, are indigent.[2] Altman has offered no evidence that § 6-08-16 is being enforced against only those NSF checks writers who are unable to pay, because of indigency, as opposed to those who are simply unwilling to pay or unable to pay for reasons other than indigency. Consequently, Altman has not met the heavy burden of proof necessary to demonstrate a constitutionally impermissible enforcement of a statute. State v. Gamble Skogmo, Inc., 144 N.W.2d 749 (N.D. 1966); People v. Macbeth Realty Co., Inc., 420 N.Y.S.2d 252 (N.Y.Supp. 1979); Butler v. State, 344 So.2d 203 (Ala.Cr.App. 1977).

Altman additionally contended in oral argument that § 6-08-16 was being enforced in a manner which violates Art. I, § 15 of the North Dakota Constitution, which prohibits imprisonment for failure to pay a debt. See State v. McDowell, 312 N.W.2d 301 (N.D. 1981), cert. denied, 459 U.S. 981, 103 S.Ct. 318, 74 L.Ed.2d 294 (1982). However, Altman failed to raise this argument either in the trial court or in his appellate brief. An alleged error not raised in the trial court or supported by

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argument in an appellant's brief need not be considered on appeal. Allen v. Kleven, 306 N.W.2d 629 (N.D. 1981); Kern v. Art Schimkal Const. Co., 125 N.W.2d 149 (N.D. 1963). The purpose of an appeal is to

review the trial court's actions, and not to afford an appellant the opportunity to develop and expound upon new strategies or theories. Edwards v. Thompson, 336 N.W.2d 612 (N.D. 1983); Mattis v. Mattis, 274 N.W.2d 201 (N.D. 1979). Furthermore, it is well established that we will refrain from deciding constitutional issues, such as the one presented by Altman, unless required to do so by the case before us. Bismarck Public Schools v. Walker, 370 N.W.2d 565 (N.D. 1985).

For these reasons we affirm the decision of the trial court.

Beryl J. Levine
Ralph J. Erickstad, C.J.
Gerald W. VandeWalle
H.F. Gierke III
Herbert L. Meschke

Footnotes:

1. In State v. Mathisen, 356 N.W.2d 129 (N.D. 1984), Justice Pederson, in his concurring opinion, raised a troublesome point namely, that any bad check law is discriminatory against people without funds. However correct that perception may be, it simply does not go far enough. A strict liability statute which criminalizes the conduct of issuing a check with insufficient funds, cannot constitutionally allow the offender with sufficient funds to cover the check, to escape penalty, while criminalizing his indigent counterpart. A violator of the law cannot rightfully purchase protection from enforcement of that law. For example, assume we have two defendants, both of whom inadvertently write checks with insufficient funds. Each believes he has $100.00 in his account and so each writes a check for $100.00. In fact, each account has only $40.00. Checkwriter A merely rectifies his mistake by paying the $60.00, thereby avoiding prosecution. Checkwriter B does not have the $60.00 because of indigency, cannot pay, and is therefore prosecuted. It is such invidious discrimination that was addressed in Carpenter.

2. Indigency has been variously defined depending on the context of the facts of a particular case and the right or privilege asserted to be due because of a litigant's alleged indigent status. See, e.g., State v. Jensen, 241 N.W.2d 557 (N.D. 1976); In re Marriage of Kopp, 320 N.W.2d 660 (Iowa App. 1982); Powers v. State, 402 P.2d 328 (Kan. 1965); Montana Deaconess Hosp. v. Lewis and C1ark County, Etc., 425 P.2d 316 (Mont. 1967); Verna v. Verna, 432 A.2d 630 (Pa.Super. 1981); Destitute of Bennington Co. v. Henry W. Putnam M. H., 215 A.2d 134 (Vt. 1965).